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No. 535

IN THE

Supreme Court of the United States

October Term, 1966

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

vs.

GERALD A. DONAHUE,
Tax Commissioner of the State of Ohio, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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The Petition for Writ of Certiorari filed in this matter does not contain a bona fide statement of grounds for invoking the jurisdiction of this Court nor a bona fide reason for granting the writ requested. The instant case does not involve a federal question.

A state may tax real and personal property in a different manner. Such action does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, at page 237, 33 L. Ed. 892, at page 895; *Ohio Oil Co. v. Conway*, 281 U.S. 146, at page 159, 74 L. Ed. 775, at page 782.

The petitioner admits that the Ohio legislature has the power, under the Ohio Constitution as amended in 1931, to classify real and personal property separately for purposes of taxation, see petition page 23. The petitioner denies that the Ohio legislature has exercised that power. The question of whether the Ohio legislature has enacted

statutes classifying real and personal property separately for purposes of taxation is a matter of state law for interpretation by state courts, and upon which state interpretations should be applied by the federal courts, *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487; *Bell's Gap Railroad Co. v. Pennsylvania, supra*; see also Title 28, Section 1652, U.S.C.A.

The Ohio legislature has separately classified personal property for purposes of taxation. In *Standard Oil Co. v. Zangerle*, 133 Ohio St. 33, 11 N.E. 2d 242 (1937), the Ohio Supreme Court said at page 35 of the official report:

> "• • • under the Intangible Tax Act (Section 5320 *et seq.*, General Code, 114 Ohio Laws, 714) *tangible personal property is classified* and different rates prescribed for different classifications, • • •"
>
> (Emphasis added.)

In *Zangerle v. Standard Oil Co.*, 144 Ohio St. 506, 60 N.E. 2d 52 (1945), the Ohio Supreme Court said at pages 511 and 512 of the official report:

> "Whether property was classified for taxation purposes either as land and improvements thereon, or as personal property, was immaterial and of no consequence prior to 1931, because under Section 2, Article XII of the Constitution, all property was then taxed at a uniform rate and at its true value in money. However, in 1931, that section of the Constitution was amended so as to provide that *lands and improvements thereon* shall be taxed by uniform rule according to value. By that amendment the former limitation of uniformity, as applied to the taxation of personal property, was removed. *The General Assembly, pursuant to this constitutional amendment, in the same year adopted a classified property tax law* including therein Section 5388, General Code (115 Ohio Laws, 564), which provides that, *excepting as otherwise provided*, personal property shall be listed and assessed at 70 per cent of the true value thereof in money. One of the exceptions to the general personal property classification for tax purposes above noted is that all

> engines, machinery, tools and implements of a manufacturer, of every kind and description, used or designed to be used in refining or manufacturing, except such as are legally regarded as improvements on land and so considered in arriving at the value of real property assessed for taxation, and except such as are used for the generation or distribution of electricity other than for the use of the person generating or distributing the same, shall be listed and assessed for taxation at 50 per cent of the true value thereof in money. * * *" (Second emphasis added.)

See also, *State, ex rel. Struble, v. Davis*, 132 Ohio St. 555, 9 N.E. 2d 684 (1937); and *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 60 N.E. 2d 170 (1945).

The petitioner's whole contention is based upon the naked assertion that because the words "true value in money" appear in both Sections 5713.01 and 5711.22, Onio Revised Code, the legislature of Ohio has placed real and personal property in the same statutory class for taxation. That said words are not words of classification is amply demonstrated by the cases cited *supra*. The petitioner fails to distinguish between classification of property for taxation and the determination of the tax on property in a class. There can be no doubt that in Ohio tangible personal property has been classified separately and apart from real estate, for purposes of taxation, and that such a classification is entirely reasonable and proper.

At page 20 of its petition the petitioner cites and relies upon *Sears, Roebuck & Company v. State Tax Commission of Maryland*, 214 Md. 550, 136 A. 2d 567. That case turned upon Maryland statutory law, not upon the equal protection clause of either their state or the federal constitution, *National Can Corporation v. State Tax Commission of Maryland*, 220 Md. 418, 153 A. 2d 287. By the time of the latter case, which was decided two years after the *Sears, Roebuck & Company* case, *supra*, Maryland had both the

constitutional provision permitting classification (as Ohio has had since 1931) and the implementing legislation (as Ohio has had since 1931) and the second, third and fourth holdings thereof are summarized as follows:

> 2. "The Equal Protection Clause of the Fourteenth Amendment does not prevent state from making reasonable classification for tax purposes and taxing different classes differently. U.S.C.A. Const. Amend. 14."
>
> 3. "Equality within a class is essential under Equal Protection Clause, but equality between different classes is not required. U.S.C.A. Const. Amend. 14."
>
> 4. "Real property and personal property may be differently taxed without violation of Equal Protection Clause. U.S.C.A. Const. Amend. 14."

On February 23, 1960, the Supreme Court of the United States dismissed an appeal of said case for want of a substantial federal question, *National Can Corporation v. State Tax Commission of Maryland*, 361 U.S. 534, 4 L. Ed. 2d 538, 80 S. Ct. 586.

From the authorities cited it is apparent that the Equal Protection Clause of the Fourteenth Amendment is satisfied so long as there is no discrimination between members of the same constitutional class. The record in this case is totally devoid of any showing by the petitioner of any unequal treatment within its constitutional class.

The petitioner's suggestion that this Court should seize upon the instant case as a "vehicle" (see page 16 of the petition) to express itself upon such reprehensible things as bribery (see petitioner's reference to the California Tax Scandal, page 16 of the petition), inadequacy of legal remedies (see page 15 of the petition), racial discrimination (see pages 16 and 14 of the petition), and the effect of "a deluge of publicity" (see page 23 of the petition) is not well founded. The record in this case contains no indication that such matters are involved here.

The requested Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

/s/ .....
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/s/ .....
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